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In the Supreme Court of the United States

October Term, 1980

FLORIDA DEPARTMENT OF HEALTH AND REHABILITATIVE SERVICES, AND A. J. TAYLOR, Its Secretary,
Petitioners,

vs.

THE FLORIDA NURSING HOME ASSOCIATION, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF THE STATES OF MISSISSIPPI, ALABAMA, LOUISIANA, GEORGIA, MISSOURI, NORTH DAKOTA, KANSAS, KENTUCKY, AND WEST VIRGINIA, AMICI CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

INTEREST OF AMICI CURIAE 1

ARGUMENT—

A State Medicaid Agency Does Not Waive the State's Eleventh Amendment Immunity by an Agreement to Abide by Federal Laws Applicable to the Medicaid Program 4

CONCLUSION 8

CERTIFICATE OF SERVICE 10

TABLE OF AUTHORITIES

Cases

Alabama v. Pugh, 328 U.S. 781, 98 S.Ct. 3057, 57 L. Ed.2d 1114 (1978) 5

Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L. Ed.2d 662 (1974) 6, 7

Florida Nursing Home Association v. Page, 616 F.2d 1355 (5th Cir. 1980) 3

King v. Smith, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968) 2

Other Authorities

42 C.F.R. §447.301 *et seq.* 4

42 U.S.C. §1396a(a)(13)(E) 2, 4

Fla. Stat. Ann. §402.34 (West Supp. 1970) 5-6

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BRIEF OF AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

The states which have joined in this brief all participate in the joint State-Federal medical assistance programs established and administered by the States and funded by state appropriations and federal grants.[1] As recipients of federal grants for Medicaid, states are required to submit state plans for medical assistance to the Department of Health and Human Services. States, once they have elected to participate in the Medicaid Program,

1. Arizona is the only state which does not participate in the Medicaid Program.

must comply with the federal laws applicable to the program. *King v. Smith,* 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968).

The Federal Medicaid Statute 42 U.S.C. §1396a(a)(13)(E) requires that states reimburse providers of long-term care services on a "reasonable Cost-related" basis. States are further prohibited from restricting or limiting reimbursement for mandatory services where such costs are both reasonable and cost-related. As a result states have little means for controlling escalating costs and utilization of mandatory service such as skilled nursing care. Consequently, each year state Medicaid agencies find it more and more difficult to secure the necessary state appropriations to fund their medical assistance programs. State agencies frequently find it necessary to seek supplemental appropriations from their legislatures to continue the Medicaid Programs to the end of their fiscal years. Unfortunately, all too often, states must make cuts in their Medicaid budgets by reducing or terminating services. Although states may not terminate or limit mandatory services, they can and frequently do make cuts in optional services such as the drug programs, intermediate care facilities, hospital days, and physicians' visits. These reductions have a serious impact on the needy citizens of such states. Many states have already made all the reductions and limitations that can reasonably be made without further jeopardizing the health of the aged, blind, disabled and dependent children within the states.

Unanticipated expenses have a particularly drastic impact on the continuation and availability of services in the state Medicaid Programs. This is especially true where the expenses are significant in amount. Long-term nursing care in most state programs is the single most expensive service and even a slight percentage increase in cost from

that program may significantly affect the very existence of other health services.[2]

The Fifth Circuit Court of Appeals' decision in *Florida Nursing Home Association v. Page*, 616 F.2d 1355 (5th Cir. 1980) offers an example of an unanticipated cost to state Medicaid Programs. The Court's decision would require the state agency to provide retroactive reimbursement based on subsequent developments in the law.[3]

Increases in program costs as a result of higher than average inflation, increased eligibility and benefits cost, a growing reluctance on the part of the public and legislatures to fund open-ended health care programs for the needy, not to mention potential liability for retroactive reimbursement of expenses, are certain to result in further reductions in the medical assistance programs.

In order to maintain an effective Medicaid Program without the threat of major disruptions in the services provided, Amici Curiae join this case in support of the position taken by the State of Florida.

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2. Mississippi's total budget for Medicaid services for the 1980 fiscal year is $234,337,617. Of this amount $97,913,398 is budgeted for nursing home care. During 1979 36.9% of Mississippi's medicaid budget was expended for nursing home care.

Alabama's total Medicaid budget for fiscal year 1979 was $275,017,155 of which $104,995,732 was expended for nursing home care.

Kentucky's total budget for Medicaid services for the 1979 fiscal year was $248,190,828 with $103,335,720 being expended for nursing home care.

Georgia's budget for Medicaid services for 1979 was $618,-429,407; Georgia however is on an accrual accounting budget system and $116,157,460 was held in reserve to pay for claims from the prior year. Long-term care facilities in Georgia include Skilled Nursing Facilities, Intermediate Care Facilities, and Intermediate Care Facilities for the Mentally Retarded. Long-Term nursing care expenditures totaled $195,062,941 for 1979.

3. Counsel for Petitioner has advised that respondents seek between $3,000,000 and $30,000,000 in retroactive reimbursement, the amount being dependent on method of reimbursement.

ARGUMENT

A State Medicaid Agency Does Not Waive the State's Eleventh Amendment Immunity by an Agreement to Abide by Federal Laws Applicable to the Medicaid Program

State plans for medical assistance under 42 U.S.C. §1396a *et seq.* must provide

> . . . for payment of the skilled nursing facility and intermediate care facility services provided under the plan on a reasonable cost related basis, as determined in accordance with methods and standards which shall be developed by the State on the basis of cost finding methods approved and verified by the Secretary; * * *. (§1396a(a)(13)(E)).

Pursuant to 42 C.F.R. §447.301 *et seq.* rates for providers nursing home care are set based on a reasonable cost-related basis. In determining what constitutes reasonable cost-related reimbursement, the state first promulgates rules or guidelines defining those allowable items of cost reasonably related to providing nursing home care. In addition, the state also secures cost reports or data from the providers showing their actual costs. These actual costs are reviewed to determine the items of allowable cost. The resulting actual allowable costs are checked to determine whether they are consistent with "a facility that is economically and efficiently operated." The resulting cost is based upon reasonable allowable costs of an economical and efficiently operated nursing home. This figure is adjusted to reflect economic conditions and trends for the period for which the rates are set.[4] Thus, a pro-

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4. Counsel for Petitioners has advised that this is the same basic procedure followed by Florida DHRS.

vider knows what rate he will receive for the coming year before he provides any services. Should he disagree with the methodology adopted by the agency to set rates, his remedy is an action to enjoin the officials to comply with the federal law rather than a suit for damages or retroactive reimbursement over a period of years.

This Court in its decision in *Alabama v. Pugh,* 328 U.S. 781, 98 S.Ct. 3057, 57 L.Ed.2d 1114 (1978) held that a state or state agency is absolutely immune to suit in federal court absent its consent. The Court there stated:

> There can be no doubt, however, that suit against the state and its board of corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of a suit. [Citations omitted]. Pp. 781-782).

The Fifth Circuit Court of Appeals in its decision while observing that the Florida legislature by statute authorized Florida Department of Health and Rehabilitative Services (DHRS) to "contract and be contracted with, sue and be sued" in actions *ex contractu,* stated:

> This language, standing alone, however, does not constitute a waiver by the state of its constitutional immunity under the Eleventh Amendment from suit in federal court. [Citations omitted].

The Court however, concluded that Florida had done more than merely waive its sovereign immunity in state court for actions arising out of contract. It found that Florida DHRS had executed a contract with the respondent nursing homes wherein it was agreed that DHRS would abide by federal laws, regulations, and guidelines applicable to the Medicaid Program, and in doing so had waived the State of Florida's Eleventh Amendment Immunity. In essence the Court found that *Fla. Stat. Ann.* §402.34 (West

Supp. 1970) gave Florida DHRS authority to bind the state by contract "for all purposes necessary to administer" its programs and that such contractual capacity conferred upon the agency by the Florida legislature also conferred upon the agency the authority to waive the State's Eleventh Amendment Immunity. The statute makes clear beyond question that the agency could contract only to the extent necessary to implement its programs. Waiver of the State's Eleventh Amendment Immunity is not required for the agency to administer any of its programs. The Fifth Circuit subsequently found that DHRS's agreement that it would be bound by federal law and regulations amounted to consent by the state to suit in federal court. Apparently, the Court considered the statutory provisions as a grant of plenary power to a state agency to bind the state to any matters which might be included in contractual form. The Court reasoned:

> By contracting with appellants to be bound by all federal laws applicable to the Medicaid Program, the state has *expressly waived* its Eleventh Amendment immunity and consented to suit in federal court regarding any action by providers alleging a breach of these laws. (At 1363). [Emphasis supplied].

The opinion of the Circuit Court, citing *Edelman v. Jordan,* 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), observed:

> While it is true that waiver of immunity under the Eleventh Amendment is not to be lightly inferred, *Edelman,* supra, . . . the "overwhelming implication" . . . of the state's agreement with appellants is that it constitutes a waiver of Florida's constitutional immunity . . . . (At 1363).

In *Edelman v. Jordan, supra,* this Court held:

> In deciding whether a State has waived its constitutional protection under the Eleventh Amendment, we will find waiver only where stated "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction." [Citation omitted].
>
> We see no reason to retreat from the Court's statement in *Great Northern Insurance Co. v. Reed,* 322 U.S. at 54, 88 L.ed. 1121 (footnote omitted):
>
> > [W]hen we are dealing with the sovereign exemption from judicial interference in the vital field of financial administration a clear declaration of the state's intention to submit its fiscal problems to other courts than those of its own creation must be found. (At 673).

Amici Curiae submit that the provider contract authorized by state statute for purposes of administering the Medicaid Program, even when a state submits itself to suit in its own courts for limited purposes, is insufficient as a matter of law to constitute a waiver of a state's constitutional immunity to suit in federal court. To hold otherwise would sanction waiver of a constitutionally protected right by inadvertence of an individual who drafts a service contract. Moreover, the statement in the Florida DHRS provider contract does nothing more than reiterate what everyone knows to be the law, i.e., that once a state has elected to participate in a joint state-federal Medicaid Program, it must comply with the federal law and regulations so long as it continues to receive federal funding. Further, the Fifth Circuit Court of Appeals appears to hold that the fact that an agency of a state may agree to abide by federal law requires a federal forum to vindicate those contractual obligations. The Court stated:

> A contrary holding in the circumstances of this case, where appellants Golden Isles and Florida Nursing Home have provided nursing services in accordance with their contractual and statutory obligations since July 1, 1976, would achieve an inequitable result.

Edelman v. Jordan, supra, requires that waiver of a state's Eleventh Amendment Immunity can be established only when the state through its legislature "expressly abrogates its constitutional immunity" or when the "overwhelming implications" from the text of the statute "leave no room for any other reasonable construction." The implications from the text of the Florida statute suggest that Florida DHRS could contract only to the extent of administering the programs it is charged with; that the administration of those programs, including Medicaid, does not necessitate the waiver of Florida's Eleventh Amendment rights; and that Florida waived its immunity to suit in state court, but not necessarily to suit in federal court where a plaintiff may obtain attorney fees under several federal statutes.

CONCLUSION

Amici Curiae contend that Fifth Circuit Court of Appeals was patently erroneous in its finding that Florida had waived its Eleventh Amendment Immunity based on the implications to be drawn from the evidence before it. The implications are neither overwhelming nor so clear as to foreclose other reasonable constructions of the statute and contracts. Furthermore, only the legislatures of the states have authority to waive their respective constitutional immunities to suit in federal court. With respect to the Medicaid Program, allowance of retroactive relief in the form of damages or reimbursement would serve neither

the interests of the public nor further the intent of Congress in enacting the Medical Assistance Act.

Accordingly, Amici Curiae, respectfully suggests the State of Florida's Petition for Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jim R. Bruce, II, a Special Assistant Attorney General for the State of Mississippi, on behalf of the Amici Curiae in the above and foregoing Brief of Amici Curiae in Support of Petitioner, do hereby certify that I have this day mailed via United States Parcel Service, first-class postage prepaid, a true and correct copy of the aforementioned Brief of Amici Curiae in Support of Petitioner to the following attorneys for Petitioners and Respondents:

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